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Supreme Court, U.S.
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No. 97-502

In the Supreme Court of the United States

OCTOBER TERM, 1997

THAI PHAM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that recent statutory changes have unconstitutionally denied him any forum in which to raise a constitutional challenge to the final order of deportation entered against him.

1. Petitioner is a native and citizen of Vietnam who entered the United States as a refugee in 1980 and became a lawful permanent resident in 1981. Pet. App. A5. In June 1994, petitioner was convicted of felonious assault under Ohio law and sentenced to three-to-fifteen years' imprisonment. *Ibid.* The Immigration and Naturalization Service (INS) thereafter commenced deportation proceedings against petitioner, on the ground that his felony conviction rendered him deportable under Section 241(a)(2)(A)(iii) of

the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(A)(iii) (1994). See Pet. App. A5. Petitioner conceded deportability, but he requested a discretionary waiver of deportation pursuant to former Section 212(c) of the INA, 8 U.S.C. 1182(c). Pet. App. A5-A6.

On April 24, 1996, while petitioner's deportation proceeding was pending, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 440(d) of AEDPA (110 Stat. 1277) amended Section 212(c) of the INA to eliminate the Attorney General's discretion to grant relief from deportation under that Section to any alien who "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii)" of the INA.[1] In May 1996, an immigration judge held that the amendment of Section 212(c) had rendered petitioner statutorily ineligible for discretionary relief under that Section, and that petitioner "[did] not appear eligible to apply for any other form of relief from deportation, including asylum and withholding of deportation, by virtue of his aggravated felony conviction." Pet. App.

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[1] Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-587, repealed Section 212(c) in its entirety and replaced it with Section 240A of the INA, 8 U.S.C. 1229b (Supp. II 1996), which authorizes a new form of discretionary relief termed "cancellation of removal." See IIRIRA § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597. The new provisions generally apply only to administrative proceedings initiated on or after April 1, 1997. See IIRIRA § 309(a) and (c), 110 Stat. 3009-625, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657. In any event, petitioner's conviction of an "aggravated felony" (see 8 U.S.C. 1101(a)(43)(F) (Supp. II 1996)) would make him ineligible for relief under the new provisions. See 8 U.S.C. 1229b(a)(3) (Supp. II 1996).

A6. The immigration judge therefore denied petitioner's application for discretionary relief and ordered him deported. *Ibid.*

The Board of Immigration Appeals (BIA) sustained the immigration judge's decision. Pet. App. A3-A4. Relying on the Attorney General's decision in *In re Soriano* (Feb. 21, 1997), rev'g Int. Dec. No. 3289 (BIA 1996), the Board agreed that the amendment made by Section 440(d) of AEDPA took effect upon enactment, rendering petitioner statutorily ineligible for discretionary relief under Section 212(c). Pet. App. A3.[2] The Board declined to consider petitioner's argument that AEDPA irrationally differentiated between exclusion and deportation proceedings, because the Board "cannot rule on the constitutionality of laws enacted by Congress." *Id.* at A4. In accordance, however, with the Attorney General's direction in *Soriano*, slip. op. at 8, the Board indicated that it would, on request, order that petitioner's deportation proceeding be reopened for the limited purpose of allowing him to retract his concession of deportability. Pet. App. A4.

2. On April 14, 1997, petitioner filed a motion to reopen his deportation proceeding. Admin. Rec. 7. The BIA granted that motion on April 16, 1997 (*id.* at 2), and the reopened proceeding is presently pending.

Petitioner also filed a petition with the United States Court of Appeals for the Sixth Circuit, seeking review, under former Section 106(a) of the INA,

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[2] A copy of the Attorney General's opinion in *Soriano* was lodged with the Clerk of this Court in connection with the filing of the government's brief in opposition to the certiorari petition in No. 96-1310, *Salazar-Haro v. INS*, cert. denied, 117 S. Ct. 1842 (1997).

8 U.S.C. 1105a(a) (1994), of the BIA's decision in his case. See Pet. App. A1. The INS moved to dismiss the petition, arguing that Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-626 (as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657), divested the court of jurisdiction to review final orders of deportation entered against alien aggravated felons. See Pet. App. A2. Petitioner did not contest the applicability of Section 309(c)(4)(G), and the court of appeals rejected his constitutional challenge to its preclusion of judicial review. *Ibid.* Accordingly, the court granted the government's motion to dismiss, in an order dated June 19, 1997. *Ibid.* Neither petitioner nor the government informed the court of appeals of the Board's order reopening petitioner's deportation proceeding.

3. Petitioner contends (Pet. 3-9) that IIRIRA's preclusion of judicial review of final orders of deportation entered against certain alien felons deprives him of a right to have some tribunal hear his claim that Section 212(c) of the INA, as amended by AEDPA (and before its repeal by IIRIRA), unconstitutionally differentiates among aliens on the basis of whether they were subject, under prior law, to exclusion or to deportation. Whatever the merits of that contention, it is not presently ripe for review by this Court. At petitioner's request, the BIA has ordered that his deportation proceeding be reopened so that he may withdraw his concession of deportability and instead contest that issue before the immigration judge (and then before the BIA). The granting of a motion to reopen deprives the deportation order previously issued against petitioner of the finality necessary, under

any circumstances, for judicial review. See 8 U.S.C. 1105a(a) and (c) (1994) (applicable to this case under IIRIRA § 309(c)); 8 C.F.R. 3.2(i) (1997); *In re Pineda*, Int. Dec. No. 3326, 1997 WL 525545 (BIA 1997).

Having sought and obtained an opportunity for further administrative review of the threshold issue of deportability, petitioner must now exhaust that potential source of relief before seeking further judicial review. If, in the reopened proceedings, the BIA ultimately finds petitioner to be deportable and enters a new final order of deportation against him, and if the court of appeals then adheres to its previous judgment that it is without jurisdiction to review that order, then petitioner may present his constitutional claim concerning Section 309(c)(4)(G), together with any challenge to the judgment on deportability rendered by the BIA in the reopened proceeding, in one petition for a writ of certiorari. Until that time, review of the decision below would be premature.

We therefore respectfully submit that the present petition for a writ of certiorari should be denied.[3]

SETH P. WAXMAN
Solicitor General

NOVEMBER 1997

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[3] Because this case is in an essentially interlocutory posture, we have not responded on the merits to the questions presented by the petition. We will file a response on the merits if the Court so requests.